

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

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Theodore Whittaker, Jr.,  
Plaintiff

vs

Hilltop Records,  
Defendant

Case No. C-1-08-555

(Barrett, J.)

(Hogan, M.J.)

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**REPORT AND RECOMMENDATION**

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This matter is before the Court on Defendant's Motion to Dismiss (Docs. 13). To date, Plaintiff has filed no response to Defendant's motion.

On July 16, 2009, the Court issued an Order to Show cause directing Plaintiff to show cause why his Complaint should not be dismissed for lack of subject matter jurisdiction, personal jurisdiction and for failure to state a claim upon which relief may be granted. To date, Plaintiff has not filed a response to Defendant's motion or the Court's Order to Show Cause.<sup>1</sup>

We find that dismissal is appropriate for failure to prosecute. District courts have the inherent power to *sua sponte* dismiss civil actions for want of prosecution to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962). Failure of a party to respond to an order of the court warrants invocation of the Court's inherent power. *See* Fed. R. Civ. P. 41(b). The Sixth Circuit has held that dismissal is an appropriate sanction pursuant to Rule 41 of the Federal Rules of Civil Procedure when there is a "clear record of delay or contumacious conduct by the plaintiff." *Carter v. City of Memphis, Tennessee*, 636 F.2d 159, 161 (6<sup>th</sup> Cir. 1980)(quoting *Silas v. Sears, Roebuck & Co., Inc.*, 586 F.2d 382, 385 (5<sup>th</sup> Cir. 1978); *see also Coleman v. American Red Cross*, 23 F.3d 1091, 1095 (6<sup>th</sup> Cir. 1994). As the court in *Carter* explained, "the key is a failure to prosecute, whether styled as a failure to appear at a pre-trial conference, failure to file a pre-trial statement, .... or failure to comply with the pre-trial order." 636 F.2d at 161(quoting *J.F. Edwards Const. Co. v. Anderson Safeway Guard Rail Corp.*, 542 F.2d 1318, 1323 (7<sup>th</sup> Cir. 1976)(per curiam)).

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<sup>1</sup> Service of the Court's Show Cause Order was unsuccessful as mail addressed to Plaintiff's last known address was returned as undeliverable. (*See* Doc.21).

Plaintiff's dilatory conduct is abundantly clear from the record. Rather than respond to Defendant's motion, Plaintiff has filed three separate documents, which have been docketed as motions, but which contain no factual or legal arguments. These documents seek relief ranging from suspending "someone from the FM Radio Station 102.7 WEBN" to dispersing "money due to actual Library of Congress Sealed mail that was delivered to the Court as evidence." (See Docs. 14, 15, 17, 18, 19). Moreover, it appears that Plaintiff has neglected to notify the Court of a change in his address. Failure to notify the Court of any change of address could result in a plaintiff not receiving timely notice of proceedings, which could, in turn, lead to a plaintiff's failure to appear and ultimately to dismissal of his case. See *Buck v. U.S. Dep't. of Agriculture, Farmer's Home Administration*, 960 F.2d 603, 608-09 (6th Cir. 1992); *Walker v. Management Systems, Inc.*, 786 F.2d 1167, 1986 WL 16514 at \* 1-2 (6th Cir. Feb. 19, 1986). It is Plaintiff's responsibility to keep the Court apprized of any change in his address. Plaintiff was ordered to show cause why his Complaint should not be dismissed by filing a response to Defendant's motion. (See Doc. 21). Due to his failure to notify the Court of his change in address, service of the Order to Show Cause (Doc. 21) could not be obtained. It is for these reasons that the Court finds that dismissal with prejudice is warranted.

**IT IS THEREFORE RECOMMENDED THAT:**

1. Plaintiff's Complaint (Doc. 3) be DISMISSED WITH PREJUDICE for failure to prosecute.
2. This case be terminated on the Court's Docket.
3. The Court certify pursuant to 28 U.S.C. § 1915(a) that an appeal from any Order adopting this Report and Recommendation would not be taken in "good faith" for purposes of granting Plaintiff leave to appeal *in forma pauperis*. See Fed. R. App. P. 24(a); *Kincade v. Sparkman*, 117 F.3d 949, 952 (6<sup>th</sup> Cir. 1997).

Date:

8/4/09

  
Timothy S. Hogan  
United States Magistrate Judge

**NOTICE TO THE PARTIES REGARDING THE FILING  
OF OBJECTIONS TO THIS R&R**

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within ten (10) days after being served with this Report and Recommendation. Pursuant to Fed. R. Civ. P. 6(e), this period is automatically extended to thirteen (13) days (excluding intervening Saturdays, Sundays, and legal holidays) in the event this Report is served by mail, and may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation are based in whole or in part upon matters occurring on the record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon, or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within ten (10) days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F.2d 947 (6<sup>th</sup> Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

1:08cv555 (Doc. 22)

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<input type="checkbox"/> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. <input type="checkbox"/> Print your name and address on the reverse so that we can return the card to you. <input type="checkbox"/> Attach this card to the back of the mailpiece, or on the front if space permits.		A. Signature <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee	
1. Article Addressed to: <b>Theodore Whitaker, Jr. PO Box 6729 Florence, KY 41022</b>		B. Received by (Printed Name) C. Date of Delivery	
2. Article Number (Transfer from service label) <b>7002 3150 0000 8389 1306</b>		D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
PS Form 3811, August 2001		3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
Domestic Return Receipt		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
102595-02-M-1540			

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<input type="checkbox"/> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. <input type="checkbox"/> Print your name and address on the reverse so that we can return the card to you. <input type="checkbox"/> Attach this card to the back of the mailpiece, or on the front if space permits.		A. Signature <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee	
1. Article Addressed to: <b>Hilltop Records c/o K.L. Weaver 6600 Sunset Blvd. Ste 302 Hollywood, CA 90028</b>		B. Received by (Printed Name) C. Date of Delivery	
2. Article Number (Transfer from service label) <b>7002 3150 0000 8389 1313</b>		D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
PS Form 3811, August 2001		3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
Domestic Return Receipt		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
102595-02-M-1540			